

Expedited Bill No. 42-05
Concerning: Minority Owned Business
Purchasing Program –Extension
Revised: January 25, 2006 Draft No. 2
Introduced: December 6, 2005
Expires: June 6, 2007
Enacted: February 7, 2006
Executive: _____
Effective: _____
Sunset Date: December 31, 2009
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the request of the County Executive.

AN EXPEDITED ACT to:

- (1) extend the sunset date for the minority owned business purchasing program;
- (2) narrowly tailor the County's minority owned business purchasing program to ensure continued compliance with constitutional requirements; and
- (3) generally amend the County's minority owned business purchasing program.

By amending

Montgomery County Code
Chapter 11B, Contracts and Procurement
Sections 11B-57 through 11B-64

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 11B-57 through 11B-64 of the County Code are amended**
2 **as follows:**

3 **11B-57. Legislative findings and policy.**

4 (a) **Minority owned businesses** have experienced the effects of
5 discrimination in the awarding of County contracts and subcontracts.

6 The effect has been to:

7 (1) make a smaller percentage of contract and subcontract awards to
8 **minority owned businesses** than the percentage of qualified
9 **minority owned businesses** in the [Washington, D.C. -

10 Baltimore Consolidated Metropolitan Statistical Area] County's
11 **relevant geographic market area** would indicate as reasonable;

12 (2) impede the economic development and expansion of **minority**
13 **owned businesses** in the [Washington, D.C. - Baltimore
14 Consolidated Metropolitan Statistical Area] County's **relevant**
15 **geographic market area**;

16 (3) impair the competitive position of minority owned businesses;
17 and

18 (4) generally harm minority owned businesses.

(b) Adoption of the **minority owned business** purchasing program is intended to remedy the effects of discrimination on **minority owned businesses**.

(c) A goal of awarding [a] an appropriate percentage of the dollar value of County contracts to **minority owned businesses** in proportion to their availability to perform work under County contracts is a reasonable and appropriate means to remedy discrimination against **minority owned businesses**.

[(d) The County draws a majority of its contractors from the Washington, D.C. - Baltimore Consolidated Metropolitan Statistical Area.]

[(e)](d)The County should actively recruit all **minority owned businesses** to provide goods, construction, and services to the County. To help achieve this goal, the County should:

- (1) notify [minority owned] all businesses of procurement opportunities;
 - (2) provide information to [minority] all business owners about the procurement system;
 - (3) provide referrals for technical assistance, sureties, and financing;
- and

(4) review procurement procedures to remove artificial barriers to competition [by minority owned businesses].

[(f)](e) A four-year period is a reasonable time to continue the **minority owned business** purchasing program before evaluating it.

[(g)](f) This article does not give any person, including a **minority owned business**, any right or status, including standing, to challenge the award of a contract or subcontract under the County procurement system. The provisions of this article are enforceable only through the oversight function of the Chief Administrative Officer and the County Council.

11B-58. Definitions.

(a) **Minority owned business** means, unless the context indicates otherwise, any legal entity that:

- (1) Is a minority business enterprise as defined under the State procurement law; and
- (2) Does not exceed a ceiling set by regulation on the number and value of contracts or subcontracts awarded during the first 5 years after it is certified under this article, or during the next 3 years if it did not exceed the ceiling during the first 5 years after it is certified.

57 However, a not-for-profit entity organized to promote the interests of
58 persons with a disability is a **minority owned business** only if at least
59 51 percent of the individuals used by the nonprofit entity to perform the
60 services or manufacture the goods contracted for by the County are
61 persons with a disability.

62 (b) **Relevant geographic market area** means the geographic market area
63 identified by the County Executive in a report dated July 1, 2005 that
64 evaluates the need to continue the program and is issued in accordance
65 with Section 11B-61(b).

66 [(b)](c) **Socially or economically disadvantaged group** means a group
67 expressly identified as eligible to control a minority business enterprise
68 under the State procurement law. For purposes of this Article, disabled
69 owned businesses and not-for-profit entities organized to promote the
70 interests of persons with a disability are a single group.

71 [(c) Washington, D.C. - Baltimore Consolidated Metropolitan Statistical
72 Area means the metropolitan areas of Washington, D.C. and Baltimore
73 as used in the Economic Census by the U.S. Department of Commerce,
74 Bureau of the Census.]

75 **11B-59. Goals; applicability.**

- (a) The Chief Administrative Officer must structure the County's purchasing program to attempt to achieve the goal so that the percentages of the dollar value of purchases identified in subsection (b) from **minority owned businesses** who have been discriminated against [is]are proportional to the availability of those businesses to perform work under County contracts in the [Washington, D.C. - Baltimore Consolidated Metropolitan Statistical Area] County's **relevant geographic market area** as determined by the most recent report that the County Executive must submit to the County Council under Section 11B-61(b).
- (b) The purchases subject to the **minority owned business** goals are any formal or informal procurement, including any contract modification or renewal, valued over \$[3,000]5,000.
- (c) The **minority owned business** goals do[es] not apply to:
- (1) grants that are appropriated by the County Council to specific grantees;
 - (2) utilities;
 - (3) intragovernmental procurements; or
 - (4) intergovernmental procurements, including a bridge contract, under Sections 11B-41 and 11B-42 if the Director determines in

96 writing that compliance with this [article] Article is impractical or
97 is outweighed by the benefits to the County of entering into the
98 intergovernmental procurement.

99 **11B-60. Procedures.**

100 (a) By September 30 of each year, the Chief Administrative Officer must
101 set for the following calendar year [a] percentage goals of the dollar
102 value of purchases subject to this Article for each **socially or**
103 **economically disadvantaged group**. The goals must correspond to the
104 availability of that group by source selection method and purchasing
105 category in the [Washington D.C. - Baltimore Consolidated
106 Metropolitan Statistical Area] **relevant geographic market area** as
107 determined by the most recent report that the County Executive must
108 submit to the County Council under Section 11B-61(b) to perform work
109 under County contracts. The Chief Administrative Officer must set [a]
110 separate goals for each **socially or economically disadvantaged group**
111 in the County's purchases of goods, construction, professional services,
112 and other services. The Chief Administrative Officer must not set [a]
113 goals for a **socially or economically disadvantaged group** unless the
114 Chief Administrative Officer determines that the value of purchases
115 made during the previous fiscal year from that group in each category of

purchases under a particular source selection method, compared with the availability of that group to perform work in that category, shows a significant under-utilization of the group.

(b) The Chief Administrative Officer must adopt procedures to certify and decertify **minority owned businesses**.

(c) The Office of Procurement must publicly notify [minority owned] businesses of prospective procurement opportunities.

(d) [The] For those procurements where a goal has been set under subsection (a), the Office of Procurement must encourage **minority owned business** participation in procurement. These activities should include:

- (1) distribution to [non-minority owned business] potential contractors for whom a goal has not been set of a list of potential **minority owned business** contractors for whom a goal has been set with a requirement that one or more be contacted if any work subject to a goal is being subcontracted;
- (2) a provision in all solicitations for procurements in excess of \$[65,000]50,000 that requires, subject to the waiver provisions of subsection (h), [non-minority owned] businesses for whom a goal has not been set acting as prime contractors to subcontract to

minority owned businesses for whom a goal has been set a percentage of the total dollar value of the contract that is consistent with the numerical goals established under [Section 11B-59] subsection (a);

(3) a requirement that a [non-minority owned business] contractor for whom a goal has not been set:

(A) agree to a plan showing how the contractor proposes to meet its **minority owned business** procurement subcontracting goal; and

(B) identify, before a notice to proceed is issued or performance of a contract begins, whichever occurs first, each **minority owned business** that the contractor intends to subcontract with and the projected dollar amount of each subcontract, and promptly notify the [contracting agency] using department of any change in either item; and

(4) contract requirements that **minority owned business** participation goals be maintained by prime contractors throughout the life of the contract, including modifications and renewals, subject to the waiver provisions of subsection (h).

Contract requirements:

156 (A) may include obligating contractors subject to the **minority**
157 **owned business** procurement goals to provide in each
158 subcontract with a **minority owned business** a provision
159 requiring the use of binding arbitration to resolve disputes
160 between the contractor and the **minority owned business**
161 subcontractor; and

162 (B) must make failure to submit documentation showing
163 compliance with a **minority owned business**
164 subcontracting plan under paragraph (3) grounds for
165 withholding any remaining payment or imposing
166 liquidated damages unless failure to comply with the plan
167 is the result of an arbitration decision under subparagraph
168 (A) or a waiver granted under subsection (h). Liquidated
169 damages under this provision must equal the difference
170 between all amounts the contractor has agreed under its
171 plan to pay **minority owned business** subcontractors and
172 all amounts actually paid **minority owned business**
173 subcontractors under the contract, considering any relevant
174 waiver or arbitrator's decision. Failure to show compliance
175 with a **minority owned business** subcontracting plan must

also result in finding the contractor non-responsible for purposes of future procurements with the County during the next 3 years.

- (e) The Office of Procurement must offer procurement system education and information to **minority owned businesses** for whom a goal has been set under subsection (a).
- (f) The Office of Procurement must offer referrals to resources such as technical consultants, sureties, and financing sources.
- (g) The Director must review procurement requirements to remove artificial barriers to competition [by minority owned businesses].
- (h) The Director may waive, or exempt a business from, **minority owned business** contracting requirements under appropriate circumstances described in regulations.
- (i) The Director may require each contractor and **minority owned business** that participates in the **minority owned business** purchasing program to provide information concerning utilization by the contractor of **minority owned businesses** in private and government contracts.

194 (j) The Chief Administrative Officer must ensure that all contract
195 administrators receive appropriate guidance in implementing this
196 article.

197 **11B-61. Reports.**

198 (a) The Chief Administrative Officer must report to the County Council, by
199 September 30 of each year for the previous fiscal year:

200 * * *

201 (6) the percentage of availability that each **socially or economically**
202 **disadvantaged group** represents in each category of purchases in
203 the [Washington, D.C. - Baltimore Consolidated Metropolitan
204 Statistical Area] County's relevant geographic market area;

205 * * *

206 (9) the total number and value of all procurements excluded from the
207 **minority owned business** goals by [section]Section 11B-59(c);

208 * * *

209 (b) By July 1, [2005] 2009, the County Executive must submit a report to
210 the County Council evaluating the need to extend the **minority owned**
211 **business** purchasing program.

212 * * *

213 **11B-63. Penalty.**

214 * * *

215 (b) A violation of this Section:

216 * * *

217 (2) [disqualified] disqualifies the violator from doing business with
218 the County for 3 years.

219 **11B-64. Sunset date.**

220 This Article is not effective after December 31, [2005] 2009.

221 **Sec. 2. Expedited Effective Date.**

222 The Council declares that this legislation is necessary for the immediate
223 protection of the public interest. This Act takes effect on the date on which it
224 becomes law.

225 *Approved:*

226

George L. Leventhal, President, County Council Date

227 *Approved:*

228

Douglas M. Duncan, County Executive Date

229 *This is a correct copy of Council action.*

230

Linda Lauer, Clerk of the Council Date